TAI MAY CHEAN v. NEW WAY CAPITAL SDN BHD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEALS NO: W-02(IM)(NCC)-561-03-2017 &
W-02(IM)(NCC)-562-03-2017]
20 APRIL 2019

COMPANY LAW: *Derivative action – Locus standi – Allegation of wrongdoing committed against company – Shareholder commenced action against shareholders and company in representative capacity – Whether shareholder had required locus standi – Whether threshold of locus standi fulfilled – Whether company itself unable to sue because wrongdoers were in control of decision-making organs – Whether wrongdoers would not permit action to be brought in name of company – Whether all wrongdoers and company cited as defendants*

CIVIL PROCEDURE: *Proceedings – Multiplicity of proceedings – Shareholder commenced derivative action by way of originating summons – Other shareholder commenced proceedings for misuse of funds, together with counterclaim, prior to originating summons – Whether there was multiplicity of proceedings – Whether res judicata applied*

One Tai May Chean ('the plaintiff') commenced originating summons ('OS'), at the High Court, against Ng Pik Lian ('NPL'), Tai E King ('TEK'), New Way Capital Sdn Bhd ('NWC') and United Eastern Resources Sdn Bhd ('UER'). The plaintiff commenced the OS in a representative capacity for and on behalf of all shareholders of UER and NWC, except NPL, and for the benefit and on behalf of UER and NWC in respect of the alleged wrongdoing committed against NWC. According to the plaintiff, (i) TEK continued to act as corporate representative of UER and participated in the management of NWC and UEW despite his status as a bankrupt; (ii) NPL, working in concert with two other illegally-appointed directors of NWC, used the illegal actions of TEK to usurp control of NWC at Board and members level, circumventing the check and balance that were originally in place; (iii) NPL thwarted the plaintiff's attempts to requisition Board meetings and extraordinary general meeting ('EGM') of UER; and (iv) the illegal directors of NWC, together with TEK, caused NWC's audited financial accounts for 2012 to 2014 to be approved without regard to queries raised by the plaintiff. Prior to the filing of the OS, NPL had commenced proceedings, pursuant to s. 181 of the Companies Act 1965, against the plaintiff and other parties for misuse of funds ('s. 181 proceedings'). The s. 181 proceedings culminated

into a global settlement agreement ('GSA') which was recorded by way of a consent order by the High Court. However, the plaintiff successfully set aside the GSA and the consent order, resulting in the revival of the s. 181 proceedings. Although there were reliefs sought by the parties in the s. 181 proceedings, as there was a counterclaim as well, the plaintiff commenced the OS for the reason that some wrongdoings in the subject companies needed to be remedied. NWC and NPL applied to strike out the plaintiff's OS on the grounds that (i) the plaintiff did not have the requisite *locus standi* to commence the action; (ii) the plaintiff was barred from commencing the action by reason of *res judicata* and/or issue estoppel; and (iii) there was a multiplicity of proceedings where similar issues were raised which were the subject matter of other pending legal proceedings. The High Court Judge ('HCJ') allowed the striking out applications on the grounds that (i) there was a paucity of evidence to show that attempts were made to have the Board of Directors to consider the purported wrongdoings; (ii) the failure by the plaintiff to name all the wrongdoers was fatal as there were two other directors who were not named in the action. This meant that the threshold *locus standi* issue remain unfulfilled; and (iii) there was a multiplicity of proceedings by virtue of (a) the s. 181 proceedings with a counterclaim by the plaintiff; and (b) the present OS. Hence, the present appeals by the plaintiff.

Held (dismissing appeals with costs)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) There were no merits in the plaintiff's contentions that (i) the HCJ failed to observe that the plaintiff made three attempts to requisition Board meetings as well as an EGM of UER to resolve the illegal actions of TEK; and (ii) the HCJ was in error in deciding that the other two directors needed to be named personally in the action. The HCJ had considered all the evidence adduced and came to a finding warranted by evidence and the law. (paras 16-18)

(2) The plaintiff's contention, that only those involved in wrongdoing needed to be named, was contrary to her averment that it was the Boards of UER and NWC that had prevented action from being taken. If this was the position taken, it was only appropriate that all the directors be named as they must, by the plaintiff's own contention, be the alleged wrongdoers. The plaintiff failed to fulfil the *locus standi* threshold of establishing that the wrongdoers had prevented any action from being taken and had also failed to name all the members of the Board in the OS as alleged. (paras 19 & 21)

(3) The HCJ had fallen into error by applying a rather formalistic and dogmatic approach to the issue of multiplicity of actions. The doctrine of *res judicata*, or multiplicity, should not be applied in such an inflexible fashion. There are distinguishing factors between a minority oppression suit and a derivative action. A shareholder, like the plaintiff, may find relief problematic due to the twin hurdles of the 'majority rule' and the 'proper plaintiff rule'. The reliefs claimed in the OS were specific to UER and NWC and not personal to the plaintiff. These reliefs might not be available in the s. 181 proceedings, which were not initiated by the plaintiff. She only filed a counterclaim as she was entitled to do. It could hardly be said that the plaintiff was somehow responsible for instigating both actions. (paras 28, 29 & 34)

Bahasa Malaysia *Headnotes*

Seorang bernama Tai May Chean ('plaintif') memulakan saman pemula ('SP'), di Mahkamah Tinggi, terhadap Ng Pik Lian ('NPL'), Tai E King ('TEK'), New Way Capital Sdn Bhd ('NWC') dan United Eastern Resources Sdn Bhd ('UER'). Plaintif memulakan SP dalam kapasiti pewakilan untuk dan bagi pihak semua pemegang saham UER dan NWC, kecuali NPL, dan untuk manfaat dan bagi pihak UER dan NWC berkenaan dakwaan salah laku terhadap NWC. Menurut plaintif (i) TEK berterusan bertindak sebagai wakil korporat UER dan mengambil bahagian dalam pengurusan NWC dan UER walaupun dia berstatus bankrap; (ii) NPL, bersubahat dengan dua orang lagi pengarah NWC yang dilantik secara tidak sah, menggunakan tindakan tidak sah TEK untuk merampas kuasa NWC pada peringkat Lembaga dan ahli, memintas semak dan imbangan yang asalnya wujud; (iii) NPL menghalang percubaan-percubaan plaintif merekuisisi mesyuarat Lembaga dan mesyuarat luar biasa ('EGM') UER; dan (iv) pengarah-pengarah NWC yang tidak sah, bersama-sama TEK, menyebabkan akaun audit kewangan untuk tahun 2012 hingga 2014 dibenarkan tanpa mengendahkan soalan-soalan yang dibangkitkan oleh plaintif. Sebelum pemfailan SP, NPL telah memulakan prosiding, bawah s. 181 Akta Syarikat 1965, terhadap plaintif dan beberapa pihak lain kerana menyalah guna dana ('prosiding s. 181'). Prosiding s. 181 berakhir dengan perjanjian penyelesaian global ('PPG') yang direkodkan melalui perintah persetujuan oleh Mahkamah Tinggi. Walau bagaimanapun, plaintif berjaya mengetepikan PPG dan perintah persetujuan, menyebabkan penghidupan semula prosiding s. 181. Walaupun terdapat relief-relief yang dipohon oleh pihak-pihak dalam prosiding s. 181, dan juga tuntutan balas, plaintif memulakan SP atas alasan terdapat beberapa salah laku dalam syarikat-syarikat yang menjadi pertikaian yang perlu diremedi. NWC dan NPL memohon membatalkan SP plaintif atas alasan (i) plaintif tidak mempunyai *locus standi* yang dikehendaki demi memulakan tindakan; (ii) plaintif terhalang daripada memulakan tindakan atas alasan *res judicata*

dan/atau isu estoppel; dan (iii) terdapat kepelbagaian prosiding dan isu-isu sama dibangkitkan, yang menjadi hal perkara lain-lain prosiding guaman yang masih berjalan. Hakim Mahkamah Tinggi ('HMT') membenarkan permohonan pembatalan atas alasan (i) kekurangan keterangan untuk menunjukkan percubaan-percubaan dibuat demi mendorong Lembaga Pengarah mempertimbangkan dakwaan salah laku; (ii) kegagalan plaintif menamakan semua pelaku salah menjejaskan kerana terdapat dua lagi pengarah yang tidak dinamakan dalam tindakan tersebut. Ini bermakna ambang *locus standi* masih belum dipenuhi; (iii) terdapat kepelbagaian prosiding kerana wujud (a) prosiding s. 181 dan tuntutan balas plaintif; dan (b) SP ini. Maka timbul rayuan-rayuan ini oleh plaintif.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Tiada merit dalam hujahan plaintif bahawa (i) HMT gagal meneliti bahawa plaintif membuat tiga percubaan merekuisisi mesyuarat Lembaga dan EGM UER untuk menyelesaikan tindakan-tindakan TEK yang melanggar undang-undang; dan (ii) HMT terkhilaf dalam memutuskan bahawa dua lagi pengarah perlu dinamakan secara peribadi dalam tindakan tersebut. Hakim Mahkamah Tinggi telah mempertimbangkan semua keterangan yang dikemukakan dan membuat dapatan yang dibenarkan keterangan dan undang-undang.

(2) Hujahan plaintif, bahawa hanya mereka yang terlibat dalam salah laku yang perlu dinamakan, bertentangan dengan hujahannya sendiri bahawa Lembaga UER dan NWC yang menghalang tindakan diambil. Jika kedudukan ini diambil, sesuai sekiranya kesemua pengarah dinamakan kerana mereka semestinya, berdasarkan hujahan plaintif sendiri, pesalah-pesalah laku yang didakwa. Plaintif gagal memenuhi ambang *locus standi* dalam membuktikan pesalah-pesalah laku telah menghalang pengambilan apa-apa tindakan dan juga gagal menamakan kesemua ahli Lembaga, dalam SP, seperti yang didakwa.

(3) Hakim Mahkamah Tinggi terkhilaf kerana mengguna pakai pendekatan formalistik dan dogmatik dalam isu kepelbagaian tindakan. Doktrin *res judicata*, atau kepelbagaian, tidak sepatutnya dipakai dalam cara yang tidak fleksibel. Terdapat faktor-faktor yang membezakan antara guaman penindasan minoriti dan tindakan terbitan. Seorang pemegang saham, seperti plaintif, mungkin mendapati relief agak bermasalah kerana rintangan berkembar, iaitu 'majority rule' dan 'proper plaintiff rule'. Relief-relief yang dipohon dalam SP khusus buat UER dan NWC dan

bukan peribadi buat plaintif. Relief-relief ini mungkin tidak terdapat dalam prosiding s. 181, yang bukan dimulakan oleh plaintif. Dia hanya memfailkan tuntutan balas kerana dia berhak berbuat demikian. Tidak boleh dikatakan bahawa plaintif yang memulakan kedua-dua tindakan.

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Arnold v. National Westminster Bank plc [1991] 2 AC 93 ***(refd)***

Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Anor [2002] 8 CLJ 218 HC ***(refd)***

Foss v. Harbottle [1843] 67 ER 189 ***(refd)***

Henderson v. Henderson (1843) 3 Hare 100 ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Johnson v. Gore-Wood & Co [2002] 2 AC 1 ***(refd)***

Kingdom Seekers Ventures Sdn Bhd v. Dato' Sri Chong Ket Pen & Ors [2015] 1 LNS 546 HC ***(refd)***

Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal [2014] 2 CLJ 401 FC ***(refd)***

Lai Kim Loi v. Datuk Lai Fook Kim & Co [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(refd)***

Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC ***(refd)***

Penang Port Commission v. Kanawagi Seperumaniam [2009] 1 CLJ 169 CA ***(refd)***

Prudential Assurance Co Ltd v. Newman Industries Ltd & Co (No 2) [1982] 1 Ch 204 ***(refd)***

Re a company [1986] BCLC 68 ***(refd)***

Re Charnley Davis (No. 2) [1990] BCLC 760 ***(refd)***

Taunton Collins v. Cromie and Anor [1964] 2 All ER 332 ***(refd)***

Legislation referred to:

Companies Act 1965 (since repealed), s. 181

Companies Act 2016, s. 346

Courts of Judicature Act 1964, s. 25(2), Schedule item II

Rules of Court 2012, O. 18 r. 19

Companies Act 1985 [UK], s. 459

For the appellants in both appeals - David Mathews, Harvinderjit Singh, Sara Ann Chay, Malarvily Perumal & Barry Goh; M/s Vin Law Co

For the respondent in Appeal 561-03-2017 - P Gananathan & Yeoh Kai Ying; M/s Gananathan Loh

For the respondent in Appeal 562-03-2017 - Robert Low & Karen Yong; M/s Ranjit Ooi & Robert Low

[Editor's note: For the High Court judgment, please see Tai May Chean v. Datin Ng Pik Lian & Ors [2017] 1 LNS 942 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] There are two appeals before us. The first appeal No. W-02(IM)-561-03-2017 ("Appeal 561") relates to the order of the High Court striking out the originating summons ("the OS") upon the application by the third defendant (first respondent in Appeal 561) *vide* encl. 11. The second appeal No: W-02(IM)-562-03-2017 ("Appeal 562") relates to the order of the High Court striking out the OS upon the application of the first defendant (first respondent in Appeal 562) *vide* encl. 17. Both orders were made by the High Court at Kuala Lumpur on 13 March 2017.

[2] Aggrieved with the orders made, the appellant filed these appeals contending that the High Court was plainly wrong in arriving at the said decisions. After careful consideration of the written submissions filed by all parties and after hearing oral arguments, we were of the unanimous view that the appeals were without merit. We therefore dismissed the appeals and affirmed the decision of the High Court. We now provide the reasons for so doing which will form the judgment of this court. For convenience, the parties will be referred to as they were in the High Court or by their abbreviations.

Background Facts

[3] The OS commenced by the plaintiff was in effect a double derivative action against four defendants. The first defendant, Ng Pik Lian ("NPL") was the plaintiff's mother. The second defendant, Tai E King ("TEK"), was the plaintiff's father who is an undischarged bankrupt. The third and fourth defendants, New Way Capital Sdn Bhd ("NWC") and United Eastern Resources Sdn Bhd ("UER"), were the subject companies in question.

[4] The plaintiff commenced the said OS in a representative capacity for and on behalf of all shareholders of UER and NWC (except for NPL) and for the benefit and on behalf of UER and NWC in respect of the alleged wrongdoing committed against NWC where it was alleged that:

(a) TEK continued to act as corporate representative of UER and participated in the management of NWC and UER despite his status as a bankrupt;

(b) NPL, working in concert with two other illegally appointed directors of NWC, used the illegal actions of TEK to usurp control of NWC at board and members level, thereby circumventing check and balances that were originally in place;

(c) NPL thwarted the plaintiff's attempts in 2014 and 2016 to requisition board meetings and EGMs of UER; and

(d) the illegal directors of NWC together with TEK caused NWC's audited financial accounts for 2012 to 2014 to be approved without regard to queries raised by the plaintiff.

[5] The derivative action was brought by the plaintiff as a 50% shareholder of UER for and on behalf of UER and its subsidiary, NWC. Her mother, NPL, was also a 50% shareholder in UER. Both of them were the directors of UER at the relevant time. The plaintiff had a 66.7% interest in NWC whilst NPL had a direct interest of 33.3% in NWC. The directors of NWC were the plaintiff, NPL, Tai Hean Leng ("THL"), who was the plaintiff's brother, and one Lau Yoke Leong.

[6] Prior to the filing of the OS, proceedings were commenced by NPL in February 2013 pursuant to s. 181 of the then Companies Act 1965 ("CA 1965") against the plaintiff and other parties for misuse of funds ("the s. 181 proceedings"). That proceeding culminated into a global settlement agreement ("GSA") which was recorded by way of a consent order by the court ("consent order").

[7] Nevertheless, the plaintiff subsequently filed a writ action to nullify and set aside the GSA and consent order ("the GSA suit"). On 21 February 2017, the GSA and the consent order were set aside by the High Court hearing the GSA suit. The effect was that the s. 181 proceedings were revived.

[8] So, although there were reliefs being sought by the parties in the s. 181 proceedings as there was a counterclaim as well, the plaintiff commenced the present OS ostensibly for the reason that some wrongdoings in the subject companies needed to be remedied. This can be seen from the prayers sought in the OS seeking for, *inter alia*, the following orders:

(a) orders to declare TEK incapable or unfit from acting as the corporate representative of UER in NWC and for the plaintiff to be recognised as the lawful corporate representative of UER in NWC;

(b) orders declaring all acts and approvals of TEK as the corporate representative of UER in NWC and all acts of the illegally constituted board of directors of NWC as null and void and to set aside the same;

(c) an order appointing an independent auditor to investigate and audit the accounts and financial affairs of NWC and its wholly and/or substantially owned subsidiaries and to prepare a forensic audit report; and

(d) other consequential orders to give effect to the above.

Decision Of The High Court

[9] The striking out applications were premised under O. 18 r. 19 of the Rules of Court 2012. The principal grounds were that the plaintiff did not have the requisite *locus standi* to commence the action, the plaintiff was barred from commencing the action by reason of *res judicata* and/or issue estoppel and there was a multiplicity of proceedings where similar issues were raised which were the subject matter of other pending legal proceedings.

[10] Both the applications were heard together. The learned judge allowed the applications and struck out the plaintiff's action. The learned judge provided the reasons for doing so in the grounds of decision. The reasons can be summarised as follows.

[11] Firstly, it was the learned judge's finding that there was a paucity of evidence to show that attempts were made to have the board of directors consider the purported wrongdoings. In this regard, the learned judge stated (at p. 19):

> [48] There is paucity of evidence to show that the plaintiff had brought specific resolution for deliberation of the board of directors of either of the Subject Companies in relation to the purported wrongdoings prior to the filing of the proceedings herein. More specifically, there is insufficient evidence to show that attempts on the part of the plaintiff (in any) to have the matters considered at board or shareholder meetings of either NWC or especially UER (where she has a direct shareholding) had in any fashion been prevented or scuttled by the wrongdoers in control. This shortcoming does little to progress the case of the plaintiff. Indeed, the originating summons seeking to initiate a derivative action must accordingly fail.

[12] Secondly, the learned judge held that the failure by the plaintiff to name all the wrongdoers was fatal as there were another two directors who were not named in the action. This meant that the threshold *locus standi* issue remains unfulfilled. This is how the learned judge put it (at p. 21):

> [53] At the risk of repetition, I emphasise that not only did the plaintiff not establish she had made attempts to get the boards or members of UER and NWC to consider taking legal action against those who allegedly perpetrated a wrong to these Subject Companies, or that those wrongdoers in control prevented any such actions from being instituted, but that the plaintiff had also not identified with requisite specificity who these alleged wrongdoers were, by failing to name all members of the board of NWC in the originating summons. The threshold *locus standi* issues unfulfilled, the instant originating summons, being a derivative action, must fail.

[13] Thirdly, the learned judge considered that there was a multiplicity of proceedings by virtue of, firstly, the s. 181 proceedings brought by NPL with a counterclaim by the plaintiff here, and secondly, the present OS brought by the plaintiff. The learned judge found that the issues raised were substantially the same with the result that a finding on the issues in one action cannot be different in another. In other words, issue estoppel operated to prevent abuse of process of the court. The learned judge concluded thus (at pp. 27-28):

> [73] In the instant case, it would as such be highly irregular for the originating summons to be pursued in this Court when the same issues ought to adjudicated and determined by the Section 181 Proceedings in another High Court having seized of the jurisdiction of hearing the case where the subject-matter was first instituted and filed. As I have emphasised in *Hup Heng Poultry*, to have the matter heard and decided in the later originating summons regardless, would unwittingly allow the Court to be privy to the abuse of its own process, which situation must vigorously be avoided in order to ensure the integrity of the administration of the justice system is duly safeguarded and given due regard at all times.
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> [74] Accordingly, given the substantial similarity of issues as set out in the averments of the parties in the originating summons and in the Section 181 Proceedings, it is more than justified that section 25(2) of the CJA be invoked to strike out the originating summons as the same offends the rule against multiplicity of proceedings and is therefore an abuse of process.

The Instant Appeal

[14] Before us, much of the same arguments were canvassed by the plaintiff/appellant to show that the learned judge had arrived at an erroneous finding. The issues raised and the submissions that followed were considered in the following fashion.

Pre-requisites For Common Law Derivative Action

[15] The applications to strike out the plaintiff's suit were premised on the issue of the *locus standi* of the plaintiff to commence the instant derivative action. The law in this context is without controversy and can be summarised as follows. The issue of *locus standi* should be decided as a preliminary point as it is in essence a threshold issue. In this regard, it is trite that the onus is on the plaintiff to establish a *prima facie* case that it is entitled to bring a derivative action. The requirements to be fulfilled in order to succeed on the *locus standi* issue, include, firstly, that the company itself is unable to sue because the wrongdoers are themselves in control of its decision-making organs. Secondly, it must be established that the wrongdoers will not permit

an action to be brought in the name of the company. Thirdly, it is mandatory for all the wrongdoers and the company to be cited as defendants in the derivative action. This is to provide an opportunity for them to respond to the allegations (see *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417; *Prudential Assurance Co Ltd v. Newman Industries Ltd & Co (No. 2)* [1982] 1 Ch 204; *Kingdom Seekers Ventures Sdn Bhd v. Dato' Sri Chong Ket Pen & Ors* [2015] 1 LNS 546; [2015] MLJU 390).

[16] The main complaint by the plaintiff in this respect was that the learned judge had failed to observe that the plaintiff had made three attempts in August 2014 and May 2016 to requisition board meetings as well as an EGM of UER to resolve the illegal actions of TEK. It was argued that NPL had not cooperated and, as a result, these meetings were never carried out due to coram failure. It was also contended that the plaintiff had also brought to the notice of the UER Board of Directors all the wrongdoings including the actions of TEK and the unlawful appointments of THL and Lau Yoke Leong.

[17] The plaintiff also argued that the learned judge was in error when he decided that the other two directors, THL and Lau Yoke Leong, needed to be named personally in the action. It was asserted that there was no need for them to be named as these two directors were appointed illegally. It was submitted that although not named, these directors had participated in the proceedings and that the learned judge was being overly formalistic in his reasoning which ignored the fact that all proper parties against whom remedies were sought were cited.

[18] With respect, we were not persuaded that these contentions had any merit. The learned judge had indeed considered all the evidence adduced. He then came to a finding which we considered to be warranted by the evidence and the law. In this context, we agreed with the learned judge's observations stated as follows (at pp. 17-18):

> [44] In my evaluation however, the plaintiff did not succeed in demonstrating evidence of either the plaintiff's attempts at having the matter deliberated by the boards for actions be taken against the wrongdoers or that the boards of the Subject Companies were preventing the Subject Companies (UER and NWC) from filing proceedings against the wrongdoers. Crucially, there is no evidence such as board meeting minutes or resolutions to show the alleged wrongdoings were ever brought to the attention of either of the two boards.
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> [45] The plaintiff must show that she had attempted to formally invoke the requisite company procedures in accordance with the governing constitution, being the articles of association of the company, before initiating a derivative action. For instance, as a director, she could have

A tried to requisition a directors' meeting by giving notice to the company secretary. No evidence of this was produced. Such failure is fatal and no *locus* can in such a situation like the present, vest in an applicant intending to initiate a derivative action.

…

B [47] In the instant case, I further observe that short of adherence to the formal process, there were letters between the plaintiff and the first defendant, including in respect of a request made by the plaintiff to the first defendant to convene a board meeting of UER. But I do not think this is sufficient. In order to establish *locus*, the applicant must show that attempts have been made towards the proper invocation of the company C procedural rules governing meetings. In any event, I should highlight that there was no similar evidence of any letters (let alone requisition notices or board minutes or resolutions) seeking to convene a board meeting of NWC. Yet, the plaintiff is a director of both UER and NWC.

[48] There is paucity of evidence to show that the plaintiff had brought D specific resolution for deliberation of the board of directors of either of the Subject Companies in relation to the purported wrongdoings prior to the filing of the proceedings herein. More specifically, there is insufficient evidence to show that attempts on the part of the plaintiff (in any) to have the matters considered at board or shareholder meetings of either NWC or especially UER (where she has a direct shareholding) had in any E fashion been prevented or scuttled by the wrongdoers in control. This shortcoming does little to progress the case of the plaintiff. Indeed, the originating summons seeking to initiate a derivative action must accordingly fail.

[19] As for the contention that only those who are involved in wrongdoing F need to be named, we found this to be contrary to the averment of the plaintiff that it was the boards of UER and NWC that had prevented action from being taken. If this was the position taken, it was only appropriate that all the directors be named as they must, by the plaintiff's own contention, be the alleged wrongdoers.

G **[20]** The circumstances prevailing in the instant case are not too dissimilar to the case of *Kingdom Seekers Ventures Sdn Bhd v. Dato' Sri Chong Ket Pen & Ors, supra*, where the High Court observed:

[21] In the circumstances of the present case, and especially considering that D7 was a public listed company with independent directors and under H the supervision of Bursa Malaysia, it was, in my view, incumbent on the plaintiff to show that the board of directors of D7 will not permit an action to be brought against D1, the purported principal wrongdoer. This is more so in the instant case where the independence of the 6 independent directors is not in issue.

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> [22] Significantly as it would appear, there has been no attempt to inform or bring to the attention of the Board the allegations as contained in the statement of claim. It was only after this suit was filed that the board was informed for the first time in the board meeting on 31 October 2014. In fact, D7 was served with an unsealed copy of the instant writ of summons and statement of claim on 28 October 2014.
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> …
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> [32] In the result, and for the reasons stated above, I am constrained to hold that no *prima facie* case has been established to show that the wrongdoers are in control and are not permitting an action to be brought in the name of the company. If indeed the board of directors of D7 had obstructed action from being taken, the directors ought to have been named as wrongdoers. The fact that the directors have not been named raises doubt as to the credibility of the plaintiff's assertions that the board will not allow its action against D1. It is my finding therefore that the plaintiff has not met the threshold on its pleaded case. For these reasons, the plaintiff's action is frivolous and vexatious and an abuse of the court process and ought to be struck out.

[21] In the circumstances, we agreed with the learned judge that the plaintiff had failed to fulfil the *locus standi* threshold of establishing that the wrongdoers had prevented any action from being taken and had also failed to name all the members of the board in the OS as per her allegations. On this ground alone, and without more, the appeals must be dismissed.

Multiplicity Of Proceedings

[22] For the sake of completeness, we also deliberated on the other ground that found favour with the learned judge in striking out the plaintiff's OS. The learned judge considered that the plaintiff had raised the same complaints here as were raised in the s. 181 proceedings. In this context, the learned judge observed (at p. 23):

> [57] I reiterate that in my assessment, having examined the affidavits of parties, most of the crux of the subject matter and the issues raised in the instant originating summons had already been set out in the Section 181 Proceedings as contained in the affidavits of the parties. It is difficult not to conclude that the fundamental basis and subject-matter of dispute in the originating summons in enclosure 1 are the same in substance, character and effect, as well as being premised on substantially the same facts, as those in the Section 181 Proceedings filed first in time, and now resurrected by the judgment setting aside the GSA.

[23] The learned judge took the view that with the institution of the OS, the plaintiff was seeking the adjudication of matters that were already the subject matter of dispute in the s. 181 proceedings which had been filed earlier. This gave rise to a multiplicity of proceedings which the High Court

had the power to dismiss under its inherent jurisdiction or in pursuance to s. 25(2) of the Courts of Judicature Act 1964 ("CJA 1964") read together with item 11 of the Schedule to the CJA 1964 which states:

> Power to dismiss or stay proceedings where the matter in question is *res judicata*, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

[24] Relying also on the cases of *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533; [1999] 4 MLJ 637; *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Anor* [2002] 8 CLJ 218; [2001] 6 MLJ 417; *Penang Port Commission v. Kanawagi Seperumaniam* [2009] 1 CLJ 169; [2008] 6 MLJ 686 ("*Kanawagi*") and *Lai Kim Loi v. Datuk Lai Fook Kim & Co* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61; [1989] 2 MLJ 290 ("*Lai Kim Loi*"), the learned judge held that the plaintiff was seeking to pursue a multiplicity of proceedings and accordingly exercised his discretion to strike out the OS the filing of which was considered to be an abuse of process.

[25] Now, the objection to multiplicity of proceedings is well-founded. It is in the public interest to avoid conflicting decisions by two different courts on the same issue between parties (see *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 and *Taunton Collins v. Cromie and Anor* [1964] 2 All ER 332). Conflicting decisions on the same issue not only bring embarrassment to the court but may also undermine public confidence in the administration of justice.

[26] The other objection to multiplicity of proceedings is the same rationale used to advance the plea of *res judicata* or estoppel. It is that a party ought not to be unnecessarily harassed by multiple proceedings on the same issue. As in *res judicata*, the public interest is the same; there should be finality in litigation and parties should not be twice vexed in the same matter (see *Henderson v. Henderson* (1843) 3 Hare 100; *Arnold v. National Westminster Bank plc* [1991] 2 AC 93 and *Johnson v. Gore-Wood & Co* [2002] 2 AC 1).

[27] The multiplicity objection differs from *res judicata* in that in a multiplicity situation, the courts have yet to decide on the issues. It is more a case of a party abusing the process of the court by raising the same cause of action or issues before different courts. It may perhaps be analogous to the doctrine of *res judicata* in the wider sense as decided in the celebrated case of *Henderson v. Henderson, supra* where it was held that *res judicata* would preclude a party from raising in subsequent proceedings matters which were not, but could and should have been brought forward, if reasonable diligence had been exercised. However one looks at it, the objective is the same; to prevent oppressive and unnecessary litigation which is underpinned by the public policy against re-litigating identical claims.

[28] So, in our view, the question the learned judge ought to have asked himself was whether the instant OS amounted to oppressive and unnecessary litigation giving rise to the overwhelming supposition that it was an abuse of the court process. In our respectful view, considering the factual matrix in the present case, the answer to that question must invite a negative response. With respect, the learned judge had fallen into error by applying a rather formalistic and dogmatic approach to the issue for multiplicity of actions. We do not think the doctrine of *res judicata* or multiplicity should be applied in such an inflexible fashion. In this context, Lord Keith in the *Arnold* case, *supra,* expressed the view (at 109B): "One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have opposite result".

[29] On this score, it is imperative to note that there are distinguishing factors between a minority oppression suit (then under s. 181 of CA 1965 and now under s. 346 of the Companies Act 2016 ("CA 2016")) and a derivative action. A shareholder, like the plaintiff here, may find relief problematic due to the twin hurdles of the "majority rule" and the "proper plaintiff rule" as decided in the celebrated case of *Foss v. Harbottle* [1843] 67 ER 189.

[30] The shareholder, in that event, can bring an oppression suit under s. 346 of the CA 2016. That provision gives a wide latitude to the courts to fashion various remedies to bring to an end the oppressive conduct. Or the shareholder can bring a derivative action on behalf of the company. As it is an action brought on behalf of the company, the cause of action, as well as the remedy, is relevant to the company only. By protecting the company in this way, the shareholder benefits indirectly. Significantly, the relief available in this action may be different to that of an oppression action.

[31] In this way, it may often be the case that the facts relied upon in each action are the same so that either action is possible on the same facts. However, the nature of the complaint and the appropriate relief sought may be different in each case. In *Re a company* [1986] BCLC 68, Hoffman J refused to strike out the petition filed under s. 459 of the UK Companies Act 1985 where the minority shareholders alleged that the company's assets were disposed of in a manner prejudicial to the interests of the petitioner. The UK s. 459 provides relief to a member of a company. Hoffman J held that the fact that the petitioners could have brought a derivative action did not prevent them seeking relief under s. 459.

[32] The foregoing observation was noted with approval by Millet J in *Re Charnley Davis (No. 2)* [1990] BCLC 760 at 784:

> The very same facts may well found either a derivative action or a s 459 petition. But that should not disguise the fact that the nature of the complaint and the appropriate relief is different in the two cases. Had the petitioners' true complaint been of the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution, then a derivative action would have been appropriate and a s. 459 petition would not. But that was not the true nature of the petitioners' complaint. They did not rely on the unlawfulness of the respondent's conduct to found their cause of action; and they would not have been content with an order that the respondent make restitution to the company. They relied on the respondent's unlawful conduct as evidence of the manner in which he had conducted the company's affairs for his own benefit and in disregard of their interests as minority shareholders; and they wanted to be bought out. They wanted relief from mismanagement; not remedy for misconduct.

[33] In a similar vein, the Federal Court in *Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal* [2014] 2 CLJ 401 had occasion to note, through the judgment of Jeffery Tan FCJ, the distinguishing features of a minority oppression suit and a derivative action (at p. 419):

> And secondly, a s. 181 petition could be maintained even if relief might also have been obtained in a minority shareholders' action (see also *A Company* [1986] BCLC 68, where it was held by Hoffman J, as he then was, that the fact that the petitioners could also have brought a derivative action with respect to the conduct which was alleged to have contributed to the unfairly prejudicial behaviour did not preclude them from seeking relief under s. 459). But where the loss suffered by the minority shareholder is merely reflective of the loss suffered by the company, "the general rule is that the reflective loss is not recoverable by the minority, as the company is the proper plaintiff to bring an action against the wrongdoing controllers. Where no injury apart from injury to the company is shown, it is arguable that the minority shareholder ought to commence a common law derivative action or apply to court under s. 216A (of the Singapore Companies Act) for leave to bring an action on behalf of the company instead of proceeding under s. 216A to obtain corporate rather than personal relief. (Walter Woon on *Company Law Revised,* 3rd edn. Para. 581 at p. 183).

[34] In the present case, the reliefs claimed in the OS are specific to UER and NWC and not personal to the plaintiff. These reliefs may not be available in the s. 181 proceedings. To recall, those proceedings were not initiated by the plaintiff. She only filed a counterclaim as she was entitled to do. So, it could hardly be said that the plaintiff was somehow responsible for instigating both actions. In the end, there was a clear omission on the part of the parties to reflect on the respective rights of shareholders and the duties of directors of a company. The acrimony between them probably coloured their judgment.

[35] Now, the learned judge relied on the cases of *Lai Kim Loi, supra*, and *Kanawagi, supra*, to support his proposition that there was a multiplicity of actions which cannot be countenanced by the court. However, we noted that there is a strong distinguishing factor in both cases in that the issues and the relief sought were identical in the two actions that were brought in each case. In short, the two authorities could not be relied upon as the factual matrix was different from the instant case.

[36] Even if there was some concern about diverse findings on the same facts in each action, the learned judge had the discretion to order a stay until the parties applied for the two actions to be heard together or to be heard one after another in the same court. The judge could then give directions as to the effect of the findings in each case and especially as to whether it would apply in the subsequent case. Considering the options available to the learned judge, the exercise of discretion to strike out the OS on this ground, with respect, was harsh and unfair to the plaintiff.

Conclusion

[37] In the circumstances, and for the reasons we have provided, we agreed with learned judge's decision on the issue of *locus standi*. We therefore dismissed both the appeals with costs of RM15,000 for each appeal subject to allocator. Deposit to be refunded.